SEKAWAN GUARDS SDN. BHD.

v.

THONG GUAN SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' WAN ADNAN BIN ISMAIL J
[CIVIL APPEAL NO. R2-12-386-93]
30 JULY 1994

CONTRACT: *Appeal against decision of Session Court Judge allowing respondent's claim - Appellant agreeing to provide security services at respondent's premises pursuant to written contract - Theft of respondent's goods - Respondent suffering loss - Respondent claiming damages for breach of contract and/or breach of duty as bailee and/or negligence - Whether appellant can raise issue not pleaded in the defence - Whether finding of fact by the Sessions Court Judge correct - Whether any merits in the grounds of appeal.*

This was an appeal against the decision of the learned Sessions Court Judge allowing the plaintiff's /respondent's claim against the defendant/appellant for the sum of RM100,000 together with interest and cost.

On 15 January 1984, the defendant agreed to provide security services at the plaintiff's premises in consideration of payment of RM1,076 per month. On 25 December 1984, a theft occurred at the said premises resulting in loss of goods worth in excess of RM100,000. The plaintiff claimed damages for breach of contract and/or breach of the defendant's duty as bailee and/or negligence of the defendant or their servants or agents.

The plaintiff claimed that the defendant was to provide a security guard who was to be locked inside the said premises. The guard had access to the ground floor and first floor and was to patrol the ground floor and first floor, and check the store through the surveillance hole on the wall of the first floor toilet. He had access to the telephones located in the office at the ground floor and in an emergency the guard could break a glass case to get keys to the main entrance kept at the staircase.

The defendant denied that the guard had access to the staircase under the agreed arrangement and accordingly had no acess to the first floor of the said premsies. Defendant's Counsel contended that the defendant was not negligent and had discharged their obligation in accordance with the contract as the guard was on the ground floor and did not hear anything. Counsel further contended that pursuant to clause 7 of the contract, the defendant could not be made liable unless the loss was caused solely by the negligence of the company's own employees. According to defendant's Counsel, the plaintiff had directly employed a guard, Gopal Singh, to look after the main entrance and another "neighbouring guard" to keep an eye on the rear of the store and the two guards had to be shown not to be negligent. Gopal Singh was not called as a witness and the plaintiff's witness gave evidence that Gopal Singh was not at the place he ought to have been on the night in question.

Held:

[1] There is evidence to support the learned Sessions Court Judge's finding of fact that the guard had access to the staircase and the first floor of the said premises. The layout plan of the ground floor and first floor of the said premises clearly shows the staircase connecting the two floors and the surveillance hole through which the store (where the goods were taken from) could be viewed from the first floor.

[2] There is also evidence to support the learned Sessions Judge's finding of fact that if the guard had carried out his duties as agreed he would have been aware of the theft as the theft could not have been a quiet affair and the guard was to remain awake all the time. According to the adjusters report, the 169 cartons of cigarettes could only have been taken away in lorries. The time needed for loading was 1 1/2 hours if 3 persons were involved and there would have been noise caused by the opening and closing of the metal sliding door. The guard could not have missed hearing the noise and ought to have noticed the theft through the surveillance hole and ought to have taken action either by using the phones on the ground floor or taking the keys to the main exit to take the necessary action. None was done.

[3] The defendant did not plead clause 7 in the defence nor the issue of negligence of the plaintiff's own guard. Therefore the defendant cannot raise this appeal. The learned Sessions Court Judge was correct in disregarding the issue. In any event the position of Gopal Singh could not in any way affect the contractual duty of the appellant under the contract as the contract makes no reference that there be other guards on duty. There are no merits to the other grounds of appeal.

[Appeal dismissed with costs].

Cases referred to:

Gimstern Corporation (M) Sdn. Bhd. & Anor. v. Global Insurance Co. Bhd. [1987] 1 MLJ 302 ***(foll)***

Malaysia National Insurance Sdn. Bhd. v. Malaysia Rubber Development Corporation [1986] 2 CLJ 285 ***(refd)***

For the appellant - M. Mohan Ghandi; M/s. Mohan Ghandi & Associates

For the respondent - Romesh Abraham (Michele K. Lim with him); M/s. Shook Lin & Bok

JUDGMENT

Wan Adnan bin Ismail J:

This is an appeal against the decision of the learned Sessions Court Judge, Kuala Lumpur allowing the plaintiff's/respondent's claim against the defendant/appellant for the sum of RM100,000 together with interest and cost.

By a contract in writing between the plaintiff and the defendant dated 15 January 1984 the defendant agreed to provide security services at the plaintiff's premises No. 32D-1 Jalan Chan Sow Lin, Kuala Lumpur (the said premises) in consideration of the plaintiff paying the defendant a sum of RM1,076 per month.

On 25 December 1984 a theft/burglary occurred at the said premises resulting in the loss of the plaintiff's goods as follows:

i) 42 boxes of Kent Deluxe 20's cigarettes @ RM1,059.10/box	RM44,482.20
ii) 6 boxes of Kent King Size 20's cigarettes @ RM970.80/box	5,824.80
iii) 2 boxes of Pall Mall 20's cigarettes @ RM1,014.90/box	2,029.80
iv) 5 boxes of Benson & Hedges 14's cigarettes @ RM1,059/box	5,295.35
v) 114 boxes of Benson & Hedges 20's cigarettes @ RM882.50/box	100,000.00
	RM158,237.15

The plaintiff alleged that the loss was caused by the breach of the contract on the part of the defendant and/or the breach of the defendant's duty as bailee to the plaintiff, alternatively the loss was caused by the negligence of the defendant, their servants or agents. The defendant's liability under the contract is limited to the sum of RM100,000.

According to the plaintiff the defendant was to provide a security guard who was to be locked inside the said premises. The guard had access to the ground floor and also to the first floor. Access from the ground floor to the first floor was by way of a staircase through the office on the ground floor. The arrangement was that the said guard was to patrol the ground floor and the first floor and to look into the store through the surveillence hole on the wall of the first floor toilet. The guard had access to the telephones which were located in the office on the ground floor. A set of keys to the main entrance was kept inside a glass case at the staircase. In an emergency the guard could break the glass to get the keys.

The defendant however said that under the arrangement the guard was to be locked on the ground floor. The guard had no access to the staircase and therefore he had no access to the first floor of the said premises.

On this point the learned Sessions Court Judge found as a fact as follows:

> tempat letaknya pegawai keselamatan di dalam premis adalah seperti telah diatur dan dipersetujui oleh plaintif dan defendant dan jika pengawal mendapati apa-apa ia boleh ambil kunci untuk keluar bagi mengambil tindakan yang sesuai dan sewajarnya;

In other words she found as a fact that the guard had access to the staircase and therefore also had access to the first floor of the said premises. She found the guard negligent.

It was the contention of the learned Counsel for the defendant that the defendant was not negligent. The guard was on the ground floor. He did not hear anything. The defendant had discharged their obligation in accordance with the contract.

As I said earlier the learned Sessions Court Judge had found as a fact that the guard had access to the staircase and to the first floor of the said premises. I find there is evidence to support her finding.

The layout plan of the ground floor and the first floor of the said premises is on pp. 30 & 31 of the record of appeal. The plan shows clearly the staircase connecting the ground floor and the first floor. It also shows the surveillence hole through which the store (where the goods were taken from) could be viewed from the first floor.

The theft could not have been a quiet affair. The guard was to remain awake all the time. According to the adjustor's report which was admitted as evidence the 169 cartons of cigarettes could only have been taken away in either 3 small lorries or one small lorry and one large lorry. The time needed for loading was 1½ hours if 3 persons were involved. There was also noise caused by the opening and closing of the metal sliding door. The guard could not have missed hearing the noise. He ought to have noticed the theft through the surveillence hole and ought to have taken action either by using the phones on the ground floor or taking the keys to main exit to take any necessary action. None was done.

The learned Sessions Court Judge again found as a fact when she said:

> Jike pengawal berkenaan betul menjalankan tugasnya seperti dijanjikan/dijadualkan ia tentu akan sedar/dapat mengesan pencurian berkenaan.

Again I will say there is evidence to support her finding.

The other contention of the appellant is that the defendant cannot be made liable unless the loss was caused solely by the negligence of the company's own employees. This is because of cl. 7 of the contract which provides as follows:

> 7. The Company shall not be liable for any loss suffered by the Owner due to burglary, theft, fire or any other cause whatsoever, Unless such loss is solely caused by the negligence of the Company's own employee acting in the course of their employment.

According to the learned Counsel the plaintiff had directly employed a guard to look after the main entrance. He was one Gopal Singh. There was another "neighbouring guard" to keep an eye on the rear of the store. It must be shown that the two guards were not negligent. Gopal Singh was not called as a witness. From evidence of the plaintiff's witness himself Gopal Singh was not at the place he ought to be on the night in question.

The defendant did not plead cl. 7 in the defence. The issue of the negligence of the plaintiff's own guard was not pleaded. The defendant therefore cannot now raise this on appeal. In the case of *Gimstern Corporation (M) Sdn. Bhd. & Anor. v. Global Insurance Co. Bhd.* [1987] 1 MLJ 302. His Lordship Wan Hamzah, SCJ said:

> The issues brought up at the trial have not been pleaded in the statement of defence and this was a contravention of O. 18 r. 8 of the Rules of the High Court and therefore the contentions should not have been entertained (*A.G. v. Lord Mayor etc. of the City of Sheffield* [1912] 106 LT 367).

The learned Sessions Court Judge was correct in disregarding the issue.

Even if cl. 7 can be raised, the burden is on the defendant to shows that the clause applies. Clause 7 is an exclusive clause. (See *Malaysia National Insurance Sdn. Bhd. v. Malaysia Rubber Development Corporation, [1986] 2 CLJ 285*).

The appellant must prove that there was negligence on the part of other people. It was for the appellant to call Gopal Singh and the other guard. It was not for the plaintiff to call them. In any event the position of Gopal Singh could not in any way affect the contractual duty of the appellant under the contract. The contract makes no reference that there be other guards on duty. There was no obligation under the contract that the plaintiff was to provide other guards. The plaintiff's claim is under the contract.

I do not find any merit in the other grounds of appeal.

For the above reasons, I dismissed the appeal with costs.